No. 99-411

IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY,

Petitioner,

v.

THEODORE WICHMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In addition to the question contained in the Petition, Respondent presents the following question:

Did the Petitioner waive its right to assert Eleventh Amendment immunity by proceeding to trial?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Argument	1
A. Abrogation Of Sovereign Immunity	1
B. By Failing To Take An Interlocutory Appeal And Proceeding To Trial On The Merits S.I.U. Waived Its Right To Assert Eleventh Amendment Immunity.	4
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 2

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 3

Coger v. Board of Regents of State of Tenn., 154 F.3d 296 (6th Cir. 1998) 2

Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2d Cir. 1998) 2

Davidson v. Board of Governors of State Colleges and Univ., 920 F.2d 441 (7th Cir. 1990) 2, 3

EEOC v. Wyoming, 460 U.S. 226 (1983) 3

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 3

Goshtasby v. Board of Trustees of the Univ. of Illinois, 141 F.3d 761 (7th Cir. 1998) 2, 3

Gregory v. Ashcroft, 501 U.S. 452 (1991) 3

Hazen Paper Co., v. Biggins, 507 U.S. 604 (1993) 4

Cited Authorities

Page

Hill v. Blind Industries and Services of Maryland, 179 F.3d 754 (9th Cir. 1999) 6

Humeanansky v. Regents of University of Minn., 152 F.3d 822 (8th Cir. 1998) 2

Keeton v. University of Nev. Sys., 150 F.3d 1055 (9th Cir. 1998) 2

Kimel v. State of Florida Bd. of Regents, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (U.S. Jan. 25, 1999) (No. 98-791) ... 1, 2, 4

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 3

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 4

Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998) 2

Oscar Mayer and Co. v. Evans, 441 U.S. 750 (1979) 4

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 4, 6

Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc., 506 U.S. 139 (1993) ... 5

Cited Authorities

Page

Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998) 2

Wichmann v. Board of Trustees of S. Illinois Univ., 180 F.3d 791 (7th Cir. 1999) 1, 2, 4, 7

Wisconsin Department of Corrections v. Schacht, 524 U.S. 381 (1998) ..... *passim*

Statutes:

29 U.S.C. § 621, *et seq.* 1

29 U.S.C. § 630(b)(2) 2

775 ILCS 5/2-101(B)(1)(C) 7

Pub. L. 93-259, Sec. 28, 88 Stat. 74 2

United States Constitution:

Eleventh Amendment ..... *passim*

Fourteenth Amendment 3

Rule:

Supreme Court Rule 15.2 4

STATEMENT OF THE CASE

The "factual background" contained in the Petition is inaccurate. Theodore Wichmann was discharged from his position as Associate Director of Southern Illinois University's (S.I.U.) Touch Of Nature Environmental Center. Dr. Wichmann had worked for the Center for 19 years and was very good at his job. Job descriptions at the Center were meaningless and had been manipulated for various purposes and no positions were eliminated in connection with Wichmann's discharge. After the discharge, when asked why Wichmann was fired, the Supervisor, Dr. Phillip Lindberg, stated: "Susan, think of it like this: In a forest you have to cut down the old, big trees so the little trees underneath can grow". Wichmann was the "old tree" and younger employees, who received promotions and pay raises as a result of the discharge, were the "little trees". Wichmann was terminated because of his age.

ARGUMENT

A. Abrogation Of Sovereign Immunity

This Court should deny the Writ of Certiorari because Congress abrogated the State's sovereign immunity under the Eleventh Amendment from suit in Federal Court under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, (ADEA) pursuant to a valid exercise of power. The arguments for and against this position have been fully set forth in the briefs submitted in *Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir.), *rehearing en banc denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (U.S. Jan. 25, 1999) (No. 98-791). The Seventh Circuit decision in this case *Wichmann v. Board of Trustees*

of S. Illinois Univ., 180 F.3d 791 (7th Cir. 1999) and its prior decision in *Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761 (7th Cir. 1998) are proper and correct analyses of law and application of principles of sovereign immunity under the Eleventh Amendment.[1]

1.- Congress must make its intention to abrogate state sovereign immunity under the Eleventh Amendment for violations of the ADEA "unmistakably clear in the language of the statute". *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The court below correctly found that this intent to abrogate is present in the ADEA. In 1974, Congress amended the ADEA to expand the definition of "employer" to expressly include "a State or political subdivision of a state or any instrumentality of a State". Fair Labor Standards Act ("FLSA") Amendments of 1974, Pub. L. 93-259, Sec. 28, 88 Stat. 74 (amending and incorporated by reference in the ADEA, 29 U.S.C. § 630(b)(2)).

The court below held that: "unless Congress had said in so many words that it was abrogating the States' sovereign immunity in age discrimination cases — and that degree of explicitness is not required . . . — it could not have made its desire to override the States' sovereign immunity clearer". *Wichmann*, 180 F.3d at 797, *quoting Davidson v. Board of*

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1. This is the position accepted by the majority of Circuit Court of Appeals: *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998). Contrary decisions have been reached in *Kimel*, 139 F.3d 1426 and *Humeanansky v. Regents of University of Minn.*, 152 F.3d 822 (8th Cir. 1998).

Governors of State Colleges and Univ., 920 F.2d 441, 443 (7th Cir. 1990). This Court's dictum also supports intent to abrogate. In *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (dictum), the Court acknowledged that: "there is no doubt what the intent of Congress was; to extend the application of the ADEA to the States".

2. Congress acted pursuant to a valid exercise of power in extending the ADEA to States. The court below has correctly held that the ADEA represents a valid exercise of Congress' power under § 5 to enforce the provisions of the Fourteenth Amendment. Equal Protection has long been held to require all state classification of persons to have at least a rational basis, treating similarly all similarly situated individuals. *Goshtasby v. Board of Trustees of Univ. of Illinois*, 141 F.3d 761, 771 (7th Cir. 1998) (*citing City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)).

In exercising its § 5 power, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts". *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The court below correctly observed that: "Equal Protection is not limited to a closed short list of privileged classifications and the Supreme Court has subjected age classifications to rational basis review". *Wichmann*, 80 F.3d at 797, *citing Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). The ADEA is an appropriate remedial and preventive exercise of power because it is directed at arbitrary and invidious discrimination.

Congress engaged in substantial fact finding and debate before it pronounced that older workers were "being deprived of employment on the basis of inaccurate and stigmatizing stereotypes". *Hazen Paper Co., v. Biggins*, 507 U.S. 604, 610 (1993). This Court has characterized the ADEA itself as directed at "invidious bias". *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). Additionally, this Court has identified the purpose of the ADEA as "elimination of discrimination in the workplace". *Oscar Mayer and Co. v. Evans*, 441 U.S. 750, 756 (1979).

Based upon the foregoing and the arguments in *Kimel*, 139 F.3d 1426 the Court should deny the Petition.

B. By Failing To Take An Interlocutory Appeal And Proceeding To Trial On The Merits S.I.U. Waived Its Right To Assert Eleventh Amendment Immunity.

Pursuant to Supreme Court Rule 15.2, regardless of the ruling in *Kimel*, 139 F.3d 1426, as an alternative reason for denying the Writ, Plaintiff argues that the nature of Eleventh Amendment immunity and the procedural background of this case dictate that the claim of Eleventh Amendment immunity in this case be deemed waived.

Plaintiff asserted below that S.I.U. waived the Eleventh Amendment argument by failing to take an interlocutory appeal. The court below summarily dismissed this argument as without merit. *Wichmann*, 180 F.3d at 797, *citing Patsy v. Board of Regents of Florida*, 457 U.S. 496, 516 n.19 (1982). Because of the unique nature of Eleventh Amendment immunity the question of waiver should be explored by the Court. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 388 (1998) (concurring opinion of Justice Kennedy).

A motion by a State to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection whose resolution will have no bearing on the merits of the underlying action. The immunity claim is asserting the right to avoid trial in Federal Court, not immunity from damages. The value to the State of its Eleventh Amendment immunity is, for the most part, lost as litigation proceeds past motion practice. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.*, 506 U.S. 139, 145 (1993). For this reason the Court has recognized the absolute right of a State to seek an interlocutory appeal, under the collateral order doctrine, to vindicate the right not to be tried. *Id.*

In the case before the Court, S.I.U. raised the issue of immunity in a pre-trial motion, which was denied by the trial court. The University chose not to appeal but to continue to object while proceeding to trial on the merits. To allow S.I.U. the opportunity to avoid the judgment by raising the immunity issue post-trial permits the University to proceed to judgment without facing any risk of adverse consequences. By allowing a claim of Eleventh Amendment immunity to be raised at any time is to treat such claim as in the nature of an objection to subject matter jurisdiction. *Schacht*, 524 U.S. 381, 388-89 (1998) (concurring opinion). A claim of Eleventh Amendment sovereign immunity should not be treated as a claim of lack of subject matter jurisdiction because there are significant differences between the two principles. First, a claim of sovereign immunity may be waived, but lack of subject matter jurisdiction may never be waived. In addition, a Court must raise lack of subject matter jurisdiction *sua sponte* but need not so raise a claim of Eleventh Amendment sovereign immunity. *Id.* Therefore, there is no logical basis for treating a claim of sovereign immunity as tantamount to a lack of subject matter in Federal Court.

This apparent illogical treatment of Eleventh Amendment immunity is clearly presented by Justice Kennedy in the concurring opinion in *Schacht*, 524 U.S. 381, 388 (1998). Given the choice, it would be foolish trial practice for any State to take an interlocutory appeal on Eleventh Amendment immunity grounds when they could try their case to a jury and reject the verdict, if unfavorable, on Eleventh Amendment immunity grounds. It is this logic which lends support for the notion that a claim of Eleventh Amendment immunity should be treated in practice as an objection to personal jurisdiction.

This concept has recently been embraced by the Ninth Circuit Court of Appeals in *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir. 1999). In *Blind Industries* the Ninth Circuit held that a claim of Eleventh Amendment immunity was waived when it was asserted shortly before trial. The Ninth Circuit apparently adopted a rule similar to that proposed by Justice Kennedy's concurrence in *Schacht* without distinguishing *Pasty v. Board of Regents of Florida*, 457 U.S. 496 (1982) and other precedent.

By adopting a rule which requires the states to assert Eleventh Amendment immunity at the outset of the proceedings, and to perfect an interlocutory appeal of a denial of its assertion, the immunity issue could be resolved without a waste of judicial resources. This case provides the perfect example since, in by-passing the right to interlocutory appeal, the parties have engaged in discovery, jury trial and appeal of trial issues. The University asserted various affirmative defenses and actively litigated the merits of the claim. Failure to take an interlocutory appeal or belated assertion of Eleventh Amendment immunity is more in the nature of

direct invocation of the jurisdiction in the Federal Court. (*Schacht*, concurring opinion 524 U.S. 381, 389 (1998)). Once a case proceeds to trial, the rationale for Eleventh Amendment protection is lost.

Additional hardship results if this rule is not adopted. In this case Theodore Wichmann, a nationally recognized specialist, has not worked in his profession since August 15, 1996. His discharge was a result of age discrimination which is prohibited by the laws of the State of Illinois in addition to the ADEA. 775 ILCS 5/2-101(B)(1)(C). All evidentiary issues raised at trial have been resolved favorably to Dr. Wichmann. *Wichmann*, 180 F.3d 791 (7th Cir. 1999). By raising the Eleventh Amendment immunity issue post-trial S.I.U. has obtained a stay of reinstatement which has been in effect for over two years. Had the University pursued the immunity claim by interlocutory appeal under the collateral order doctrine the jurisdictional questions would have been resolved prior to trial. The University has frustrated the ends of justice by effectively denying Dr. Wichmann's right to return to his prior position. Reversal and remand at this point in time leaves Dr. Wichmann in a procedural abyss. His right to return to work has clearly been established but he may reach retirement age before ultimate resolution. For these practical reasons, claims for Eleventh Amendment immunity should be quickly addressed, or deemed waived as are claims of lack of personal jurisdiction. To accomplish that end requires a ruling that failure to take an interlocutory appeal results in waiver of the immunity claim.

On this basis, the Petition for a Writ of Certiorari should also be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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